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January 27, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Rate Regulation, MM Docket No. 92-266

Dear Ms. Searcy:

Please find enclosed, on behalf of the National Association of Telecommunications Officers and Advisors, et. al., an original and nine copies of comments filed as part of the Commission's proceeding in MM Docket No. 92-266.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,

William E. Cook, Jr.

William E. Cook, Jr.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-266
Rate Regulation	

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

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January 27, 1993

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SUMMARY

Congress intended the Federal Communications Commission ("Commission") and local cable franchising authorities to share responsibility for implementing the rate regulation provisions in the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Local Governments urge the Commission to adopt regulations implementing Sections 623, 612 and 622(c) that enable Local Governments to work cooperatively with the Commission to ensure that cable subscribers receive the protections intended by the 1992 Cable Act.

In implementing Section 623 the Commission should craft regulations that reflect the fundamental statutory goal of ensuring that "where cable television systems are not subject to effective competition, . . . consumer interests are protected in the receipt of cable service." Section 2(b)(4), 1992 Cable Act. Consistent with this goal, the rate regulations should "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." Section 623(b)(2)(A).

Local Governments believe that it would be consistent with the public interest and administratively efficient for the Commission to grant municipalities sufficient flexibility in enforcing the Commission's

regulations for the basic cable tier. The municipality's responsibility should be to apply those regulations as it deems proper so long as such application is not irreconcilable with the Commission's regulations, or is not arbitrary and capricious. Moreover, to reduce the administrative burdens on the Commission of national rate regulation, Local Governments encourage the Commission to grant franchising authorities a role enforcing the Commission's regulations governing the rates for cable programming services, leased access, and subscriber bill itemization. Such flexibility is also consistent with Congress' desire that franchising authorities and the Commission act as partner in regulating cable systems.

Local Governments urge the Commission to take the following actions to achieve the statutory policy reflected in Sections 623, 612 and 622(c):

- adopt a method for national benchmark rates;
- eliminate monopoly rents in current cable rates;
- prevent evasions by roll-backs to October 1992 rates;
- presume no "effective competition" in franchise areas;
- permit local communities to jointly regulate rates;
- adopt "post card" basic rate certification form;
- preempt state law prohibiting rate regulation;
- unbundle equipment rates from programming service rates;
- limit equipment and installation rates to "actual costs";

- regulate rates for tiers containing premium services;
- require cable system to prove that rate is "reasonable";
- do not exempt small cable systems from rate regulation;
- reduce leased access rates for non-profit users; and
- limit cable bill itemization to direct costs.

Local Governments believe that adoption of the proposals recommended above will ensure that the public receives the full benefit of the rate regulatory protections in the 1992 Cable Act.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-266
Rate Regulation	

TO: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, the "Local Governments")[1] hereby submit these comments in the

[1] The National Association of Telecommunications Officers and Advisors represents local franchising authorities in more than 4,000 local franchise jurisdictions, which collectively regulate cable television systems that serve an estimated 40 million cable subscribers. The National League of Cities represents more than 16,000 cities and towns across the nation. The U.S. Conference of Mayors represents the more than 950 cities with populations exceeding 30,000 residents. The National Association of Counties represents the approximately 2,000 counties across the nation.

above-captioned proceeding.

INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks comment on proposed rules to implement Sections 623, 612, and 622(c) of the Communications Act of 1934 ("Communications Act"), as amended by Sections 3, 9, and 14 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Pub. L. No. 102-385, 106 Stat. 1460 (1992). Local Governments focus in these comments primarily on implementation of Section 3 of the 1992 Cable Act, which mandates that the Commission and franchising authorities regulate the rates that cable operators charge for cable service.

Local Governments believe that the main goal of the Commission in implementing Section 623 is to adopt regulations that are consistent with the statutory policy of ensuring that "where cable television systems are not subject to effective competition, . . . consumer interests are protected in the receipt of cable service." Section 2(b)(4), 1992 Cable Act. Consistent with this goal, Local Governments believe that such regulations should "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." Section 623(b)(2)(A).

Local Governments believe that it would be consistent with the public interest and administratively efficient for the Commission to grant municipalities maximum flexibility in enforcing the Commission's regulations for the basic cable tier and to show deference to a municipality's application of such regulations so long as such application is not irreconcilable with the Commission's regulations, or is not arbitrary and capricious. Moreover, to reduce the administrative burdens on the Commission of national rate regulation, Local Governments encourage the Commission to grant franchising authorities a role in enforcing the Commission's regulations governing the rates for cable programming services, leased access, and subscriber bill itemization. Such flexibility and enforcement power are consistent with Congress' desire that franchising authorities and the Commission act as partners in regulating cable rates. Local Governments have recommended below how to achieve these objectives.

DISCUSSION

I. RATE REGULATION PURSUANT TO SECTION 623

A. The Commission's Regulations Must Ensure that the Rates for Cable Service Are Reasonable.

Section 623 requires that the rates for basic cable be "reasonable" and that the rates for cable programming services not be "unreasonable." The Commission asks "whether the purpose and the terms of the Cable Act embody a congressional intent that our rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted (and if so, to what degree), or, rather a congressional intent that regulatory standards serve primarily as a check on prospective rate increases." Notice of Proposed Rulemaking In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266 at ¶ 4 (released Dec. 24, 1992) (hereinafter "NPRM"). Local Governments believe that Section 623, and the 1992 Cable Act's legislative history, clearly indicate that Congress intended for current rates to be reasonable and, to the extent such rates are not reasonable, that the Commission reduce current rates.

Section 623 requires that the rates for basic cable service be "reasonable," and does not place any statutory limit on the Commission's power to take

action -- by rate reductions or other means -- to ensure that rates meet this statutory standard. Moreover, Section 623(b)(1) states that "the goal" of the Commission's regulations should be to protect "subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged . . . if such cable system were subject to effective competition." This goal will not be achieved if the Commission allows cable operators with rates that exceeded a competitive rate to continue to charge such an unreasonable rate.

Section 623 also requires that the rates for cable programming services not be "unreasonable." Congress unambiguously intended the Commission to reduce existing rates for programming services found to be unreasonable in response to complaints filed within the first six months after the Commission's rate regulations become effective. See Section 623(c)(3).

If Congress had not intended for the Commission to reduce rates at all, then Congress would not have expressly granted the Commission the power to reduce rates for cable programming services pursuant to Section 623(c)(3), and would have placed a limit on the right of the Commission to reduce the rates for basic cable service.

The 1992 Cable Act's legislative history also demonstrates Congress' concern with the monopoly rates charged for cable service, and its intent that such rates be made "reasonable." The House, for example, noted that "rate increases imposed by some cable operators are not justified economically and that a minority of cable operators have abused their deregulated status and their market power and have unreasonably raised the rates they charge subscribers. The Committee believes that it is necessary to protect consumers from unreasonable rates." H.R. Rep. No. 628, 102d Cong., 2d Sess. 33 (1992) (hereinafter "House Report").

Where Congress has enacted legislation to regulate the rates of a monopoly industry, the Supreme Court has stated that a federal agency should not interpret such legislation to allow rates to be regulated at current market rates. For instance, in interpreting rate regulations imposed on the natural gas industry, the Supreme Court stated:

> We should also stress that in our view the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the [Natural Gas] Act. It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. Hence the

> necessity for regulation and hence the statement in Sunray DX, 391 U.S. at 25, that if contract prices for gas were set at the market price, this "would necessarily be based on a belief that the current contract prices in an area approximate closely the 'true' market price -- the just and reasonable rate. . . . [S]uch a belief would contradict the basic assumption that has caused natural gas to be subjected to regulation." In subjecting producers to regulation because of anti-competitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price.

FPC v. Texaco Inc., 417 U.S. 380, 397-99 (1974) (emphasis added).

Similarly, Congress implemented Section 623 to curb monopolistic rates; Congress noted that "[w]ithout the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers." Section 2(a)(2), 1992 Cable Act. It would "contradict the basic assumption" of Section 623 if the Commission did not reduce current rates from their current monopolistic levels, and simply limited regulation to future rate increases.

The statutory command that the Commission ensure that cable rates are reasonable should govern how it interprets the various provisions in Section 623. As long as cable rates are reasonable, cable subscribers

will be protected, and such rates should not have an adverse effect on "the cable industry, its investors, subscribers, future growth of services and of programming, and service quality."[2] NPRM at ¶ 5.

Moreover, the establishment of a "benchmark" reasonable rate provides cable operators with some certainty about the revenues they may expect to receive from subscribers for cable service. Such certainty will enable cable operators to plan for the future growth of a cable system in terms of, for example, upgrades and investments in programming. Moreover, a benchmark rate should provide financial markets and investors security about the financial position of a cable system since

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[2] The Commission expresses concern that its rate regulations might result in an unconstitutional taking of property. See NPRM at ¶ 33 n.66. As long as the Commission's rules are not confiscatory, the Fifth Amendment does not bar their imposition. See FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987) (holding that Communications Act's rate provisions do not constitute a taking of property within meaning of Fifth Amendment). A rate would be confiscatory under the Commission's rules only if it "destroy[s] the value of [the] property for all the purposes for which it was acquired." See Covington & Lexington Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 597 (1896) (holding that courts are empowered to restrain unjust and unreasonable rates violative of due process). So long as a cable operator may recoup costs not completely covered by the regulated rate on a tier of service in the rate set for non-regulated programming services offered on a per channel or per program basis, Local Governments do not believe that a cable operator can demonstrate an unconstitutional taking of its property.

such markets and investors will have a clearer idea of the revenue generating capability of a cable system.

What follows in this section of our Comments is a discussion of how the Commission should implement the various provisions of Section 623 consistent with its obligation to ensure that cable rates are reasonable.

B. Effective Competition Standard

The Commission raises various questions regarding the implementation of the "effective competition" standard in Section 623, including the following: (1) whether a competitor should be presumed to offer "comparable programming" if it offers multiple channels of video programming and the numerical tests for the offering of and subscription to competitive service under the effective competition test are met; (2) whether the penetration rate for competitors should be measured cumulatively or individually; (3) whether the standard for gauging whether households are "offered" video programming should be that service is "actually available" to such households; (4) whether the Commission should count each separately "billed or billable" customer as a "household"; and (5) what qualifies as a "multichannel video programming distributor." Local Governments also believe the Commission should clarify that the test of whether "effective competition" exists in a franchise area

should be determined only in those areas of the franchise where the cable operator actually provides cable service to subscribers. Local Governments address each of these issues as follows:

1. Only an Individual Multichannel Video Programming Distributor May Satisfy the 15-Percent Penetration Test

Local Governments believe that Section 623, and its legislative history, prohibits the Commission from measuring the 15-percent penetration test under the effective competition standard "cumulatively, i.e., by adding the subscribership of all alternative multichannel video programming distributors (other than the largest) together." NPRM at ¶ 9. The Conference Committee Report provides that the 15-percent penetration test is met only if a single competitor serves 15 percent of the households in a franchise area:

> "effective competition" means . . . the franchise areas [sic] is served by at least two unaffiliated multichannel video programming distributors offering comparable video programming to at least 50 percent of the households in the franchise area, and at least 15 percent of the households in the franchise area subscribe to the smaller of these two systems . . . .

H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 62 (1992) (hereinafter "Conference Report") (emphasis added). Moreover, the House Report to H.R. 4850, from which the "effective competition" standard is taken, states that

effective competition means that "at least two sources of multichannel video programming are offered to 50 percent of households and subscribed to by at least 15 percent of households." House Report at 89.

2. Multichannel Video Programming Distributors Providing a Similar Number of Channels Provide "Comparable Programming."

Local Governments strongly disagree with the Commission's conclusion that a multichannel video programming distributor should be considered to be offering "comparable video programming" if it simply offers multichannels of video programming and if the numerical tests for the offering of and subscription to competitive service under the effective competition test are met. NPRM at ¶ 9. Instead, the test should be based on a comparison of the number and types of programming provided by a cable operator and its competitor, and may vary from community to community. For example, a multichannel multipoint distribution system ("MMDS") that provides 15 channels of non-local television broadcast video programming in a small town might offer programming "comparable" to the 20 channels of service -- fifteen of which are non-local broadcast channels -- provided by the local cable operator.[3]

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[3] In measuring "comparable programming," the Commission should compare the non-local television broadcast

[Footnote continued on next page]

However, that same MMDS system cannot be said to offer "comparable video programming" to a cable system that provides more than 50 channels of non-local television broadcast programming. Nor should a four channel MMDS system be said to offer programming comparable to that offered by a system offering 20 channels of service.

Measuring whether programming is comparable based on an actual comparison of competitors is supported by classic economic theory and antitrust law -- two disciplines in which the term "effective competition" is widely used and understood. Under antitrust law, the Supreme Court has held that products must be "reasonably interchangeable" by consumers to be competitive with each other. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (in determining the relevant market in an antitrust claim, the Court concluded that interchangeability rests on considerations as to "price, use and qualities").

[Footnote continued from previous page]
programming provided by the cable system since that is the programming subscribers cannot receive without the provision of cable service. Local broadcast programming received for free over the air and is available independently of a multichannel video programming service. Moreover, in defining effective competition, Congress rejected the notion that broadcast stations are a source of competition to a cable system, and, thus, Congress did not intend for such stations to be considered as a comparable source of programming to that offered by a cable operator.

For cases in which a product or service consists of more than one component, such as cable service with its tiers of programming service offerings, the Supreme Court has developed an additional analysis that takes into account the unique nature of the package as well as the availability of substitutes for each component. In determining the area of effective competition for such packages, the Court has adopted a "cluster" approach, which includes within the relevant market only those goods or services that include the entire range of offerings of the original product. See, e.g., United States v. Connecticut Nat'l Bank, 418 U.S. 656, 664 (1974) (individual services offered by savings bank -- as then limited by regulatory authorities -- were not substitutes for packages of services offered by commercial bank). The "cluster of services" analysis is particularly appropriate for a cable television system, which makes available an array of services through a single communications medium.

Local Governments recommend that the Commission count as a competitor to a local cable system any alternative multichannel video programming distributor which provides approximately the same number of channels (non-broadcast) of video programming. Local Governments suggest that multichannel video programming distributors should be considered to offer comparable programming

only if there is a 20-percent or less difference in the number of channels of programming offered by the competitors. Although the 20-percent test is only a "guesstimate" of comparable programming and does not ensure that the quality of programming is similar, it is consistent with Congress' intent that competitors provide "comparable" programming, and is easily administrable -- thus reducing administrative burdens on the Commission, franchising authorities and cable operators in applying.

3. Effective Competition Should Be Measured in a Cable Operator's Service Area

Although not addressed in the NPRM, Local Governments believe that the Commission should clarify that the test of whether a cable operator faces effective competition in a "franchise area" should be based only in the cable operator's service area, which Local Governments define as the area where the cable operator is actually providing cable service to households. Otherwise, a cable operator might seek to avoid rate regulation by wiring less than the entire area in which it is franchised to provide cable service, although its penetration rate in the area where it actually provides cable service may be far in excess of 30 percent. Moreover, in several cities, two cable systems simply operate in separate halves of the

franchise area and only serve households in their half of the franchise area. If the Commission measured "effective competition" in the "franchise area," then these systems would be deemed subject to "effective competition" -- assuming they both have a penetration rate of 15 percent or more -- despite the fact that they do not compete head-to-head in any portion of the franchise area. Congress did not intend for cable operators to undermine the rate protections for cable subscribers in Section 623 by measuring "effective competition" in the manner described above.

4. Cable Service Must Be "Actually Available" to a Household

Local Governments agree that a multichannel video programming service should not be considered as "offered" to a household unless it is "actually available" to a household. However, Local Governments do not believe that a service, though technically available, should be considered "actually available" unless potential local subscribers are aware of its availability. For instance, a direct broadcast satellite ("DBS") service, which may be technically available to the entire country, should not be considered "actually available" if the DBS distributor is not actively marketing the service through local means in a particular community. Advertisements in the

national media, such as a national magazine, should not be considered in determining whether the service is being marketed locally.

Instead, the Commission should not determine that a service is "actually available" to a household unless it is both technically available and the distributor of such service is actually marketing the service to the households locally, as demonstrated by the use of telemarketing, advertisements in local newspapers and on local television and radio broadcast stations, billboards, and other local marketing means.

5. Only "Billed" Customers Should Be Considered "Households"

Local Governments agree that the Commission should use "billed" customers in measuring the number of households[4] under the effective competition standard. Such a standard is easily administered since it can be determined based on the billing records of cable operators and other multichannel video programming distributors. Local Governments are confused by the Commission's suggestion that it also count "billable" customers in measuring the number of households, and

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[4] In measuring households in a franchise area, the Commission should count only homes where people actually reside. Vacant or abandoned property should not be counted in such a measure since such sites obviously are not in the market for multichannel video programming services.